

December 2, 2019

The Honorable Judge Bianco  
U.S. District Court – EDNY  
100 Federal Plaza  
Central Islip, NY 11722

Your Honor,

**New evidentiary issues have been brought to my attention in the last week.**

Bryan Berard recorded podcasts and presented himself for media interviews with incredible revelations related to this instant case, *raising Brady issues, and confirming previous Kenner requests as critical.*

*Criminal threat of violence versus Kenner...*

Berard and podcast announcers claimed they are going to have **someone at MDC “beat the shit out of him in there”** – and in light of the Jeff Epstein “issues” and resulting charges on the MCC officers -- and recent identical MDC issues (**under seal**) – this criminal threat of violence is exactly what Kenner expressed concern for the rest of his life in his sentencing memo (*ECF No. 730*) from Jowdy's cabal (including Berard and any other Jowdy-protectorate).

*Berard's CTE has been confirmed...*

Berard confirmed to the media that he “**cannot remember anything**” because of his **CTE** – and that is why he is suing the NHL for “**brain damage**”.<sup>1</sup>

Berard told the media on 8-16-2018 that he sustained “*repetitive brain injuries*” during his career and now has serious medical problems as a result. Berard says he sustained at least five concussions.

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<sup>1</sup> The primary symptoms of **CTE** have been described neurological experts (including Dr. Ann McKee) at Boston University's Neurological Center as:

*CTE, a catastrophic disease first associated with boxers long ago, results when a toxic protein, Tau, accumulates in the brain, kills brain cells, and leads to symptoms such as cognitive dysfunction, memory loss, sleeplessness, depression, diminished impulse control, episodes of anger, and dementia, among others. Until recently, CTE could only be confirmed through an autopsy. **Tau proteins are released whenever concussion occurs.***

- Based on these symptoms, including *faulty memory, confusion and mistakes*, Kenner had previously requested the court extend “*new evidence*” discovery because Berard and over 300 other former-NHL players made public admissions of **brain damage** and **cognitive degenerative issues** – specifically including **memory loss** (and many of them from the instant case, *which concentrated around their memories of specific details of their passive-equity investments*).
  - They were asked by the government if they “*remember what they were never told*” ...as Kenner's criminal act of concealment.
- Specifically, *faulty memory* was the precise defense by the government (*ECF No. 440 at 16*) to defend 100% of the inconsistent statements of their witnesses during trial on material issues (all in contradiction to the witnesses’-own pro-Kenner transparency for years prior to trial). *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).
- Berard was a government-star-witness and touted by the NY Daily News on November 13, 2013 with John Kaiser for their relentless efforts to indict and arrest Kenner (in a pre-prepared story and pictorial). It was written by a close friend of Jowdy and his NY attorney, Tom Harvey (Michael O’Keefe).<sup>2</sup>

**CTE** – Berard confirmed in the podcasts that he is suing the NHL for CTE...

<sup>2</sup> Berard spoke with NY Daily News beat-writer O’Keefe in 2010 (over a year *after* his seizure and two (2) years *after* his first FBI contact while in Russia, *infra*), all *years before* his newfound-podcast-revelations and 2015-trial-alleged “split” with Kenner based on trust. But -- Berard sent Kenner the following text about his communication with O’Keefe (**Kenner question hi-lighted in YELLOW**, *infra*):

1	+14015		S	
5	246929	5/1/2010	e	
1	Bryan	12:06:48	n	[Kenner]: Good job with the reporter. Who was it?
7	Berard*	AM(UTC+0)	t	
7				
1	+14015		R	
3	246929	5/1/2010	e	[Berard]: The douchebag from daily news. <u>Told him</u>
1	Bryan	12:11:12	a	<u>he's an idiot for printing these articles and he can quote</u>
8	Berard*	AM(UTC+0)	d	<u>me that I've been to both properties over a dozen times</u>
5				<u>and Jowdy has not done his job.</u>
1	+14015		R	
3	246929	5/1/2010	e	
1	Bryan	12:11:34	a	[Berard]: He shut up right away and said sorry for
8	Berard*	AM(UTC+0)	d	bothern u. And hung up
6				

Thru his haze of **CTE**, the court should note that Berard now claims he lost between \$3 and \$6 million due to Kenner (from a forged line of credit) – while Berard never had more than \$1.5 million under Kenner management – in total over the years (or \$850,000 in his original LOC before it was reduced). The documents Rule 16 documents confirm Berard drained his savings to support his lifestyle spending frenzy, *unrelated to Kenner*.

- Berard and the government refused to “these” allege forgeries at trial due to their knowledge of the truths and back-up documents available to impeach Berard at trial -- notwithstanding the impeaching evidence yet discovered in the pending Northern Trust subpoena documents, which took 10 weeks to arrive, *past the departure date of Berard and all of the government “memory loss” witnesses who could not even remember their LOCs (Tr.2065-66).*<sup>3</sup>
- This was similar to Joe Juneau’s **CTE**-trial fabrications of loss (*Tr.259*) in spite of documented evidence confirming Juneau’s loss resulted from his personal French Canadian investment advisor (not Kenner). Juneau confirmed this loss during in his 2009 Arizona arbitration testimony; under his French-Canadian financial advisors scheme (not Kenner).

*Berard and Kaiser's civil litigation versus Kenner ...*

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<sup>3</sup> Although Nolan testified thru his own haze of **CTE** that he never knew about his LOC, the government knew that Northern Trust Banker Aaron Mascarella gave a March 2009 deposition (*Bates stamp: AM030909*) that confirmed he had been speaking to Nolan about his LOC between 2003 and 2006 (*ECF No. 668 Appendix at 170-71*). The government also knew they had Rule 16 evidence that Nolan’s wife was personally making payments on the LOC in 2006, including the repayment of a loan:

- *Bates stamp: MYR0001066*, produced by Nolan’s investment advisor during a 2009 litigation;
- *Bates stamp: NOLAN0005249*, produced by Nolan himself during the 2009 arbitration, further verifying his real time retention of the transparent emails; and
- *Bates stamp: NOLAN0005044*, Nolan’s 2006 Hawai’i partners k1 tax document, produced by Nolan during the 2009 arbitration confirming Nolan retained it from his 2006 tax records, wholly verifying the exact amount of his LOC funds and Hawai’i partners investment)
  - ***All available to the Court upon request.***
- The August 2006 Northern Trust LOC communication included Owen Nolan’s wife (Diana), her personal business manager, and her Wells Fargo private banker; wholly removing any possible concealment of anything from any Nolan advisor in real time: ***and hi-lighting the severe Nolan CTE at the time of his 2015 testimony (9 years later).***

Berard and John Kaiser were defendants in two (2) civil theft cases initiated by Plaintiff-Kenner in 2012 and 2013 for millions in documented thefts by the two (2) of them. Kenner discovered the thefts after they began working in Mexico for Jowdy. The two (2) theft cases against Berard and Kaiser were terminated after Kenner's arrest in 2013 (benefitting Kaiser and Berard into the millions in guaranteed losses at civil trial in Arizona). In fact, Kaiser and Berard lost their ancillary 2015-defense cases to four (4) Kenner clients – after their collective defense was, again, that Kenner forged their names on documents. The real evidence was unequivocally produced by Kenner to the four (4) interveners and their attorney. These documents (available for this court upon request) confirmed that Kaiser was involved in the signing of the actual documents and transmitted them between himself, Kenner and the interveners personally. The Berard document was witnessed by Berard's best-friend, Lanie Donlan ([3500-LD-2 at 2, 3](#)) (known and ignored by the FBI case agent and IRS agent Wayne to avoid a tracing/forgery testimony conflict) ([Bates stamp: PKHome-0013158-160](#)) ([Tr.3454-57](#)).<sup>4</sup>

- Unfortunately at the 2015 Arizona trial, the attorney for the Plaintiff-interveners was able to confirm with Berard's own text communication, between himself and Kenner, that Berard (1) *signed the document* (with Lanie Donlan as the witness), (2) *notarized it in Boston*, and (3) was using Kenner's FedEx account to send it to Kenner. The communication is available to the court upon request ([ECF No. 668 Appendix at 62-63](#)). All of the Kaiser, Berard and Donlan forgery claims were disposed of by the Arizona court as inauthentic defense claims, as well as confirming the "fraudulent conveyance" of title away from Kenner (considered a criminal act, only if it were by Kenner's doing). Berard and Kaiser delayed the Arizona civil case until after the 2015 EDNY criminal trial, knowing their "forgery" defense would fail (based on the evidence Kenner provided to the plaintiff-interveners pre-trial). The adverse ruling was filed 7-24-2015 (Judge Hannah – cv2012-055576) -- and is available to the Court upon request.

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<sup>4</sup> Donlan panicked in 2015 in cross-examination upon request for the actual document she testified she scanned and emailed for Kenner (which never existed in the 2,000,000 documents in Rule 16 production):

*Q. Well, as relates to what you just testified to, ma'am, is there some means by which we can obtain a copy of this document you say you saw Phil tracing signatures on? That is my question.*

*A [Donlan]: I don't know. I don't know. It's in '05. I don't have it. I have the memory of it. It's just something I really remembered.*

- The Arizona Judge also hi-lighted Berard's false testimony that he had given Kenner \$160,000 for the project but Berard could not produce his-own banking records to substantiate the alleged investment/transfer (*See Ruling at ¶ 34*).

*Brady violations related to Berard/Russia-FBI communication...*

Berard claimed to the podcast that he was in Russia with Kenner-client Chris Simon when he "discovered" problems with his investments (2008-09)...

- Berard retired from professional hockey after his 2008-09 season playing for Vityav Checkov of the Kontinental Hockey League (KHL) in Russia. This is confirmed on Wikipedia.

Berard claimed the FBI contacted him and discussed the issues about Kenner ***while he was in Russia (understandably a significant event to recollect when and where he was – despite his CTE symptoms)***...

- Berard retired by April 2009 (from Russia and pro-hockey), so the communication would have had to pre-date this.

○ **So -- Where are the 302(b) FBI notes?**

- These *Brady* disclosures will have critical *mens rea issues* for Berard prior the *exact time* he authorized his Northern Trust collateral to be seized and gave testimony in a 2009 Arizona arbitration about these identical issues.
- ***Why are they missing?*** And – specifically the Court should note that Kenner's earliest communication with the FBI was June 24, 2009 – thus – the Berard pre-dated 302(b) notes would independently verify his pre-arbitration "discoveries" and Kenner-FBI communications.
- Berard confirmed to the media that he and Chris Simon (in Russia) thought Kenner robbed them after looking at emails and records. *These records do not exist*. Berard *never* turned them over to the FBI. Simon has *never* been alleged as a victim of anything (other than the Jowdy crimes). The government *never* produced documents to support Berard's newly remembered allegations (contemporaneous with Berard's CTE disclosures).
- The court knows Berard testified in May 2009 in the Arizona arbitration.
  - This was *after* the Russia-FBI contact and missing FBI notes;

- This was after the Berard-Kenner collateral seizure confirmation texts (*infra*);
- This was after the Berard-authorization for collateral seizure;
  - So – the original FBI notes of this star witness will reveal exactly what Berard thought in 2008-09 when talking to the FBI – considering:
    - Berard supported Kenner and confirmed full Hawai'i Jowdy loan knowledge and the use of his LOC in May 2009 – but...
    - Berard claimed in 2015 that he had no idea of either (while working for Jowdy – like the John Kaiser amnesia issues)...

**The Court should note that:**

- Berard told the FBI (in 2014 – [3500-BB-1-r](#)) that he found out about his LOC seizure thru a FedEx that said his funds were already taken...
  - **No letter ever existed....**
  - If it did, it would have been mailed to the same address as (1) the two 2009 default letters, (2) the numerous LOC statements from the 2015 Northern Trust subpoena, (3) the 2006 change in terms agreement to lower Berard's collateral (from \$850,000 to \$650,000) directly from Northern Trust banker Mascarella ([Bates stamp: PKHome-0012162](#)), and ultimately (4) the four years of LOC signup and renewal documents (all verified in the 2015 Northern Trust subpoena with Berard's Rhode Island address).
  - Five (5) days before the LOC collateral seizure – the Berard March 2009 texts asked Kenner:

620 7	+140152 46929 Bryan Berard*	3/26/2009 6:53:59 PM(UTC+0)	R e a d	When u get chance can we look at <i>how much money will b freed up after payn off line of credit NT???</i> Thanks
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- Regarding his residual cash after his \$650,000 LOC payoff ([Kenner Rule 29 – ECF No. 668 at 46, footnote 32](#));
- This text was **5 days before** Berard authorized his collateral seizure on April 1 (and **12 days before** the DUE DATE – verified with [Bates stamp:](#)

*TNTC000010* – which was received at Berard's Rhode Island home – just like his February 2009 LOC statement – Bates stamp: *TNTC000012*);

- Without Berard's verbal approval – the bank could not have seized his funds **7 days before** a **due date** – *it is incomprehensible....*

Kenner replied to Berard, confirming Berard would have “*300k*” available:

7280	+14015246929 Bryan Berard*	3/26/2009 7:00:51 PM(UTC+0)	Sent	<b>[Kenner]: ~300k</b>
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And Berard replied:

620 8	+140152 46929 Bryan Berard*	3/26/2009 7:04:18 PM(UTC+ 0)	R e a d	<b>[Berard]: Cool thanks!!! When will that b freed Gonna use 200 for a cool oppurtunity will show u and talk 2 u abt it later. <u>Good for all of us n future.</u></b>
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- The Court should note that every LOC client received LOC statements that were in the Northern Trust subpoena (*Kenner trial exhibit 210*) – contradicting the government claims that there was no notice of the LOC from Northern Trust Bank (but -- frankly a Patriot Act banking issue *if actually true*). It was debunked by Northern Trust banker Aaron Mascarella – *Tr.912*):

*[Mascarella]: I know it doesn't help you today right now, but that a copy [of the LOC statements] was also sent to each one of the borrowers.*

None of the Berard texts and Mascarella LOC testimonial confirmations comport with AUSA Komatiredy prejudicing Kenner, calling him “*insane*” for suggesting that Berard and others authorized the seizure of their collateral (all confirmed days before their due dates, thus irrefutable, *ipse dixit*) (*Tr.5996*).

Only \$150,000 from the instant case is traceable to anything to do with Berard – and ***those funds went to his boss – Ken Jowdy*** -- in Mexico as part of the 2004 Hawai'i loan. Berard confirmed his authorization and knowledge when he testified to the 2009 arbitration (*ECF No. 770 at 61-62*):

*[Berard arbitration testimony -- Day 5 at 76-77]:*



*Q. Were you aware that Mr. Kenner got a credit line against some securities or investments you had?*

*A [Berard]: Yes.*

*Q. And later on were you aware that Mr. Kenner starting lending this money to another principal in the Cabo project named Ken Jowdy?*

*A [Berard]: Yes.*

*Q. Were you aware that he had disclosed to you that he was going to lend this money at a rate of interest to benefit the investors?*

*A [Berard]: Yes.*

*Q: And later on were you aware that Mr. Kenner started lending this money to another principle in the Cabo project names Ken Jowdy?*

*A [Berard]: Yes.*

*Q: Where did you think the money that Mr. Jowdy – were you told where the money that was given Mr. Jowdy as far as the Mexican project? Was there anything you were told about that?*

*A [Berard]: Basically just loan him the money for the project.*

In 2010 -- when FBI agent Galioto was threatening investors to back off Jowdy and needed to separate themselves from Kenner – Berard sent Kenner the following text about FBI agent Galioto's lack of knowledge regarding the Jowdy thefts:

131 44	+14015246 929 Bryan Berard*	<b>4/28/2010</b> 8:54:28 PM(UTC+0)	R e a d	<b>Tell agent [Galioto] to shut the fuck up. Doesn't have a clue.</b>
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And when working with Giuliani's investigation group in 2010 – Berard told Kenner:

137 08	+1401524 6929	<b>6/5/2010</b> 9:29:08	R e	<b>That's fosure. Hopefully this is light at end of tunnell.. Just makes me nervous wth Tommy.</b>
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	Bryan Berard*	PM(UTC+0)	a d	Hopefully he [Constantine] just takes what they give him quietly and not end up wth another Jowdy
137 11	+1401524 6929 Bryan Berard*	<b>6/5/2010</b> 9:43:24 PM(UTC+0)	R e a d	I agree. I don't give a fuck abt him [Constantine]. Just don't want him to fuck this up like Jowdy.

And as a result of the joint efforts with Kenner – now two (2) full years after Berard spoke with the FBI the first time in Russia (with the missing 302(b) notes) – Berard sent Kenner the following texts about Kenner's Hawai'i-Mexico investors:

169 49	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:00:25 PM(UTC+0)	R e a d	I wanna just get these guys there \$ back and let's go do stuff wth small group
169 50	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:03:41 PM(UTC+0)	R e a d	Honestly. Fuck the rest.
169 51	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:29:07 PM(UTC+0)	R e a d	Same wth mexico too. <u>Uve put up wth enough bullshit over the years. Try get them there \$ back and wash ur hands wth all these retards.</u>
169 52	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:29:18 PM(UTC+0)	R e a d	And I mean all of them

Kenner replied to Berard:

199 59	+14015246 929 Bryan Berard*	<b>10/7/2010</b> 11:39:45 PM(UTC+0)	S e n t	[Kenner]: I'm going to let you make all of those decisions in the future!
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Berard finished his replies to Kenner:

169 53	+1401524 6929 Bryan	<b>10/7/2010</b> 11:40:16 PM(UTC+0)	R e a	NO THANKS. Ha
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	Berard*		d	
169 54	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:40:43 PM(UTC+0)	R e a d	If I did probably end up being just 5 of us
169 55	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:40:48 PM(UTC+0)	R e a d	Maybe 4. Ha
169 56	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:55:51 PM(UTC+0)	R e a d	hopefully this is the sign of the beginning of the end. 6 more months done all this shit
169 57	+1401524 6929 Bryan Berard*	<b>10/7/2010</b> 11:56:06 PM(UTC+0)	R e a d	<b>Hopefully can go after Leaman Borthers soon too</b>

The Berard 2008-09 FBI proffer will confirm EXACTLY what Berard knew before his CTE symptoms began confabulating his memories with his recently acquired “excuses” for his lifestyle degradations (and complimented by his Jowdy employment status).

In fact, considering Berard and Kaiser were allegedly “suspicious of Kenner” as early as 2008 (according to the Berard-FBI contacts and podcast recollections), it is unexplainable that they continued to pursue business dealings with Kenner for years (until their employment under Jowdy in 2012). On the same day as Berard espousing to Kenner to “*wash ur hands of all these retards*” (referring to Kenner’s dozens of clients), Kenner confirmed submitting a multi-million dollar purchase offer with Kaiser and Berard (and Kenner funding the entire operation, again):

Berard asked Kenner about the land development offer in Utah:

1 6 9 3 6	+14015 246929 Bryan Berard*	10/7/2010 6:20:32 PM(UTC +0)	R e a d	<b>[Berard]: Anything cooking in Mormon country??</b>
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Kenner replied, referring to Kaiser as “JK”:

1	+14015	10/7/2010	S	<b>[Kenner]: Utah backup offer should go in today. Jk has to sign it</b>
9	246929	6:23:54	e	
9	Bryan	PM(UTC	n	
3	Berard*	+0)	t	
6				

**Conclusions:**

The recent revelations of the Berard **CTE** degeneration, impulse anger<sup>5</sup> towards Kenner consisting of criminal threats of bodily harm<sup>6</sup>, require Court intervention for the threats and investigations into the now-clear *Brady* violation of the Berard 2008-09 interview, with critical *mens rea* timing – considering his conflicting stories and **CTE** confessions.

Respectfully submitted,

Phil Kenner (ProSe)

<sup>5</sup> As noted, *supra*, a symptom of **CTE**.

<sup>6</sup> These threats extend the documented previous threats of physical harm by Berard as noted in Kenner's *Rule 41(g)* submission (*ECF No. 670 at 7-8*). Please note the government denied returning the requested videos of Berard's rants about killing Kenner for going after Jowdy in Mexico to recover the documented Jowdy loan funds (*government-forfeiture-44*) -- and the criminal actions documented in *ECF No. 667* (“*The Jowdy Hoax*”).